82-1452

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IN THE

Supreme Court of the United States

October Term, 1982

JOSEPH ERRANTE,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether Double Jeopardy and the Rules of Criminal Procedure forbid conviction for a lesser included offense of a charge dismissed for lack of evidence under Rule 29, Fed.R.Crim.P.?

2. Whether withdrawal should be a recognized defense to a conspiracy charge?

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No.:_____

IN THE

Supreme Court of the United States

October Term, 1982

JOSEPH ERRANTE,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Michael Pollack, on behalf of Petitioner, Joseph Errante, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on the 2nd day of December, 1982, affirming the judgment of conviction and sentence of the District Court.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, reported at 695 F.2d 45 (2d Cir. 1982), is appended to this Petition as Appendix A.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered December 2, 1982, and a copy thereof is appended to this Petition as Appendix B. An order denying Petitioner's Petition for Rehearing with Suggestion for Rehearing *En banc* was entered January 11, 1983, and a copy thereof is appended to this Petition as Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes, Federal Rules and Regulations Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall...be subject for the same offense to be twice put in jeopardy of life or limb..."

Rule 29(a), Federal Rules of Criminal Procedure provides:

> Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Rule 31(c), Federal Rules of Criminal Procedure provides:

> The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Statement of the Case

A. Introduction

On September 17, 1981, a two-count indictment was filed, charging Petitioner, co-defendant Vito LoRusso and "others to the Grand Jury unknown" with conspiring to distribute and possess with intent to distribute heroin (21 U.S.C. § 846), and possession with intent to distribute heroin (21 U.S.C. § 841). It was alleged that the defendants attempted to purchase a large quantity of narcotics from both a government informant and an undercover agent of the Drug Enforcement Administration ("DEA"). The proof at trial was adduced largely through the testimony of the informant and the undercover agent, and through various tape recordings made during these witnesses' negotiations with the defendants.

Petitioner denied conspiring to violate the narcotics laws, least of all with his co-defendant, with whom he had constant, emotional disagreements. He urged as well that he had withdrawn from any negotiations prior to the formation of the alleged criminal conspiracy.

B. The Trial Testimony

Co-defendant LoRusso was first introduced to DEA agent John Costanzo by informant "Mimmo" when the three dined at LoRusso's restaurant in the Little Italy section of New York in September of 1980. Four months later Mimmo called LoRusso from Milan, Italy, and LoRusso said a friend wanted to purchase a large quantity of heroin.

On January 24, 1981, after certain preliminary, nonconsequential telephone conversations, LoRusso and Petitioner flew to Milan. They were met by Mimmo and Costanzo at the airport, and introductions were made over lunch. Petitioner allegedly said he was authorized to purchase heroin for certain persons in New York who wanted to begin distributing heroin. Certain details were discussed.

Later the same day the four met again, and Errante said he was authorized to pay in advance for 10 kilograms of heroin. The parties agreed that the purchasers would pay the prevailing New York market price at time of delivery. Petitioner then said he would return to New York and asked LoRusso to phone him on January 28. Apparently this was done, for on January 28 LoRusso phoned Mimmo and reported that Errante's family had approved the deal.

After certain initial difficulties, the four met in New York on February 7 and a price of $120,000 per kilo for ten kilos was proposed by Costanzo. At the time, however, LoRusso accused Petitioner of being a policeman and the meeting was aborted. However, another meeting was held the following day. Petitioner said the price was agreeable but that "his people" wanted to purchase only one kilo. Costanzo suggested a compromise of five kilos. Although no agreement was reached, the method of delivery was discussed. Nevertheless, LoRusso kept questioning Petitioner's bona fides.

At 4:00 p.m. on February 9, Costanzo and Errante met at LoRusso's restaurant and agreed to a one kilogram heroin sale for $120,000. But when Costanzo informed LoRusso of the arrangements, the latter reiterated his distrust of Errante. Both Costanzo and Mimmo then angrily told LoRusso they wanted nothing further to do with him. LoRusso, however, later told Mimmo that his fears of Errante had subsided, and it was agreed that LoRusso could be present when a sample was to be delivered the next day.

On February 10, a three gram sample was given to Errante for testing. The sample proved satisfactory and it was therefore agreed that the sale could go forward.

The deal, however, was never consummated. Costanzo balked when Errante demanded that the heroin be delivered before payment, and subsequent attempts to exhume the deal failed. When Mimmo later told LoRusso that Costanzo was now willing to accept

Errante's terms, LoRusso replied that Errante wanted nothing more to do with either Mimmo or Costanzo and that he had told LoRusso to "tear everything."

C. The Motion to Dismiss

After the government rested, the defense moved pursuant to Rule 29, Fed. R. Crim. P., to dismiss each count of the indictment. As to Count One, counsel urged that Petitioner's withdrawal from, and frustration of the conspiracy constituted a complete defense thereto. The district court disagreed. As to Count Two counsel urged that the evidence was insufficient to prove the defendants intended to distribute the sample which had been provided to Errante for testing. After a comprehensive review of the pertinent evidence the court found the government's evidence to be entirely speculative, and dismissed Count Two.

Following this dismissal the government, for the first time, requested pursuant to Rule 31(c), Fed. R. Crim. P., that the court submit to the jury the lesser included offense of simple possession of a controlled substance (21 U.S.C. § 844). The court agreed, and Petitioner was convicted of both counts.

D. The Opinion of the Court of Appeals

On December 2, 1982, the Second Circuit Court of Appeals affirmed the District Court's judgment of conviction and sentence with respect to both the Petitioner and his co-defendant, Vito LoRusso.

In so ruling, the court rejected Petitioner's arguments in their entirety, including his assertion that the Double Jeopardy Clause and the Federal Rules of Criminal Procedure prohibited the trial court from submitting the lesser-included offense under Count Two to the jury.

The Federal Rules were not violated, said the Court of Appeals, because the submission of the lesser offense constituted a permissible modification of the district

court's oral, interlocutory order dismissing Count Two. (12a). The Double Jeopardy Clause was not violated, the Second Circuit held, since the oral judgment of dismissal had not yet been entered nor had the jury been discharged (15a).

The circuit court also rejected Petitioner's assertion that the defense of withdrawal had been established as to Count One, conspiracy. The court explained that withdrawal had never been recognized in the Second Circuit "as a defense to a conspiracy count directed at the period prior to withdrawal" and that, in any event, Petitioner's actions had not manifested a "complete and voluntary renunciation" of the criminal purpose. (16a-17a n.5).

Reasons for Granting the Writ

Point I

Double Jeopardy and the Rules of Criminal Procedure Forbid Conviction for a Lesser-Included Offense of a Charge Dismissed for Lack of Evidence Under Rule 29, Fed. R. Crim. P.

The subtle yet critical—interplay between double jeopardy protections and pre-verdict dismissals under Rule 29, Fed. R. Crim. P. has not previously been explored by this Court. Yet the need for such exploration is underscored by the events which occurred in the trial court. A serious charge was dismissed under Rule 29 for want of evidence. Then, for the first time, the government asked the court to instruct the jury concerning a lesser-included offense under the count which had been dismissed. The court complied and the defendant was convicted.

The Second Circuit found this procedure permissible because the district court had only exercised its inherent power to "amend" or "modify" its "oral" "interlocutory" order of dismissal, and because this procedure did not occasion a second trial in violation of double jeopardy.

The circuit court's opinion, however, views far too narrowly the scope of double jeopardy protection and misconstrues the nature and effect of an order granting a Rule 29 dismissal. Moreover, the circuit court failed to consider with appropriate circumspection the machinations of the government which resulted in this procedural and constitutional morass.

A. This Court Should Definitively Rule that a Pre-Verdict Order Dismissing a Charge for Lack of Evidence Pursuant to Rule 29, Fed. R. Crim. P., is Not Subject to Reconsideration or Amendment

Rule 29, Fed. R. Crim. P., abolishes "motions for a directed verdict" and empowers the court to enter a "judgment of acquittal" where the evidence is insufficient to sustain conviction. The change in nomenclature was to "accord with the realities," *see* Advisory Committee Notes to Rule 29, and, indeed, an order entered pursuant to Rule 29 is equivalent to a jury verdict of acquittal. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571-72 (1977).

This being so, amendments or modifications of Rule 29 orders should be subject to the same limitations as are jury verdicts of acquittal, which may be altered prior to their official "entry" only if published erroneously, as by either a slip of the tongue or the use of an incorrect verdict form. *E.g., United States v. Mears*, 614 F.2d 1175 (8th Cir.), *cert. denied*, 446 U.S. 949 (1980); *Brown v. Gunter*, 562 F.2d 122 (1st Cir. 1977). Certainly, an oral jury verdict—even though not officially entered—may not be re-opened simply to permit further deliberations. *Cf. Brown v. Gunter*, 562 F.2d at 125, *supra* ("the trial judge...had determined...that the changed verdict was not the result of renewed deliberations.").

The absolute finality of an acquittal, be it by a judge, announced prior to a jury verdict, or by the jury itself following deliberations, categorically distinguishes it from most other orders, which are subject to substantive reconsideration pursuant to the trial court's

inherent authority to correct its errors. *See Opinion of the Circuit Court* at 12a.[1] The circuit court's contrary ruling destroys the essential identity between a pre-verdict Rule 29 order of acquittal and a jury's verdict of acquittal, so carefully crafted by this Court.

B. The Submission of the "Lesser" Offense Reflected the Improper Addition of an Entirely New Charge, Rather than a Modification or Amendment of a Previous Ruling

When the defendants invoked Rule 29 to urge a dismissal of Count Two, the government made a transparently tactical decision not to request the addition of a lesser-included offense prior to the court's ruling, obviously not wanting to encourage a "compromise" order by his Honor. Then, its gambit having failed, the government for the first time requested the submission of the "lesser" offense.

Yet the government's request cannot properly be viewed as a motion to "reargue" or "modify" a previous order, as the circuit court found, since such a motion must be based on points of law assertedly "overlooked" or "misapplied" by the court. *See, e.g.,* Rule 41, Fed. R. Evid. There was no assertion that the district judge "overlooked" or "misapplied" anything, since the government had not previously requested that a lesser-included offense be charged.

In reality, then, the government sought and obtained the belated addition of an entirely new charge, a manifestly improper course. This new offense was, to be sure, necessarily included in the dismissed count, but it was added subsequent to the order of dismissal and not as a result of what may fairly be characterized as a modification or an amendment thereof.

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[1] Of course, the government could appeal a post-verdict order of acquittal under Rule 29 if not violative of double jeopardy. *See* 18 U.S.C. § 3731; *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).

The government ought not be permitted to flout or manipulate the rules of procedure, let alone the court and the other litigants. Undoubtedly the use of similar tacks by the defendants would have been viewed as a waiver of the tardily pursued theory. The rules of procedure, promulgated by this Court, should be enforced evenly. The government's ploys should not be countenanced, and the plain import and effect of the rules should be upheld.

C. The Submission of the Lesser-Included Offense Violated Double Jeopardy

This Court has on numerous occasions considered the parameters of the double jeopardy protection. As the circuit court noted, the Double Jeopardy Clause provides three fundamental protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense.

13a, *quoting United States v. Wilson*, 420 U.S. 332, 343 (1975), *quoting in turn North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

It would, however, elevate form over substance to require, as a *sine qua non* of a valid double jeopardy claim, a second full-blown trial before an entirely different jury. For instance, a claim of jeopardy would certainly have been meritorious had Petitioner's jury actually been discharged after the granting of the Rule 29 motion, then brought back the next day to deliberate on a lesser offense after the court had a change of heart.

Yet the hypothesized scenario is substantially identical to what actually occurred. The jury physically remained in the courtroom, because another count of the

indictment survived, but it has long been the rule that "[e]ach count in an indictment is regarded as if it were a separate indictment," *Dunn v. United States*, 284 U.S. 390, 393 (1932), and the jury should therefore be considered to have been discharged as to Count Two immediately upon that count's dismissal. In exhuming the dismissed count, a completely new trial was not required, but only because the jury, in effect, adopted all the evidence previously submitted to it.[2]

Moreover, the court's ruling occasioned additional proceedings regarding the dismissed count, including closing argument, jury instructions and deliberations. If the risk of a complete re-trial were a requisite to a valid assertion of double jeopardy the "attachment" of jeopardy at the very commencement of trial—when the jury is first impanelled and sworn (*see Serfass v. United States*, 420 U.S. 377, 388 (1975))—would appear excessively harsh and unnecessary.

"The crucial question," said this Court in *Lee v. United States*, 432 U.S. 23, 30 (1977), "is whether the order contemplated an end to all prosecution of the defendant for the offense charged." *See also United States v. Scott*, 437 U.S. 82, 97 (1978). Certainly an order of dismissal under Rule 29 contemplates just that. *Cf. In re Dowling*, No. 48280-2, 32 Crim.L.Reptr. 2344 (Wash. Jan. 6, 1983) (en banc) (Double jeopardy violated by trial court's reconsideration of finding that State failed to rebutt presumption of eleven year old defendant's incapacity).

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[2] The opinion, as written, would also support results in other cases which, quite clearly, would be improper. For example, since the granting of a Rule 29 motion is no less an acquittal than is a jury verdict of not guilty, (*See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571-72 (1977)), the circuit court's decision would present no constitutional impediment to the government requesting—and obtaining—an instruction on a lesser-included offense after a jury has returned a verdict of not guilty, so long as the judgment of acquittal had not been "entered" and the jury had not been discharged. Similarly, if the panel's reasoning were correct, the government may, after a finding of not guilty by the court at a bench trial, request for the first time consideration of a lesser offense. Yet both of these scenarios would appear improper under double jeopardy principles and procedural law.

Point II

Withdrawal Should Be Recognized as a Defense to a Conspiracy Charge

Despite Petitioner's withdrawal from the drug conspiracy and his thwarting of its purpose, the district court refused to consider whether a defense to Count One had thereby been established. As the Second Circuit accurately observed, withdrawal simply has not heretofore been recognized by that court as a defense to a conspiracy charge (16a n.5). We respectfully urge this Court to now rule that withdrawal is, indeed, a valid defense, and to reverse Petitioner's conviction under Count One.

A defendant's withdrawal from a conspiracy has long been deemed relevant to the epplication of the statute of limitations and to the defendant's liability for subsequent, substantive offenses by co-conspirators. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). Traditionally, however, once a defendant has entered into a conspiracy, guilt for that offense is not obviated by withdrawal. W. LeFave & A. Scott, *Criminal Law* 486 (1972).

This restrictive view is changing. *Id.* The Model Penal Code, for instance, provides an affirmative defense to a conspiracy charge when "after conspiring to commit a crime, [the defendant] thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." Section 5.03(6) [Tent. Draft No. 10, 1960]. Additionally, each of the proposed revisions to the federal criminal code has recognized the defense of withdrawal. Thus, the original report of the Brown Commission, published in 1971, proposed:

> In a prosecution under section 1003 or 1004 [conspiracy] it is an affirmative defense that, under circumstances manifesting a complete renunciation of his criminal intent, the defendant prevented the commission of the crime or crimes contemplated by the conspiracy, as the case may be.

Final Report of the National Commission on Reform of Federal Criminal Laws (Brown Commission) § 1005. Subsequent revisions have adopted this approach. *E.g.*, Criminal Justice Reform Act of 1975 (S.1), 94th Cong., 1st Sess., § 1002(c); Criminal Code Reform Act of 1977 (S.1437), 95th Cong., 1st Sess., § 1002(b).

Several of the commentators also have urged reform similar to those proposed by the Model Code and Senate bills. *See, e.g.*, W. LeFave & A. Scott, *supra* at 487; "Developments in the Law — Criminal Conspiracy," 72 Harv.L.Rev. 920, 958 (1959); Rotenberg, "Withdrawal as a Defense to Relational Crimes," 1962 Wis.L.Rev. 596, 605. As LeFave & Scott notes, the defense, as recognized in the Model Code and elsewhere is sound, based as it is on

> ...two most sensible propositions: (1) the act of agreement is not of itself sufficiently undesirable and indicative of the defendant's dangerousness to warrant punishment in spite of the subsequent withdrawal; and (2) it is proper to require a thwarting of the conspiracy because the objective of a conspiracy will generally be pursued in spite of renunciation by one conspirator.

LeFave & Scott, *supra* at 487-88. Moreover, the availability of the defense may serve as an inducement to conspirators to withdraw and prevent the occurrence of contemplated crimes.

Here, counsel's attempts to proffer the withdrawal defense failed because of prevailing Second Circuit law. This law, however, is unsound and, further, is counterproductive to the fair and efficient administration of justice. As such it should be abandoned for the more enlightened approach of the Model Code and other cited authorities.

Conclusion

For all the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

Dated: New York, New York
10 February, 1983

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Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 83, 84, Dockets 82-1082, 82-1096

UNITED STATES OF AMERICA,
Appellee,

v.

VITO LORUSSO and JOSEPH ERRANTE,
Defendants-Appellants.

Argued: Aug. 31, 1982 Decided: Dec. 2, 1982

Defendants were convicted before the United States District Court for the Southern District of New York, Thomas P. Griesa, J., of conspiracy to distribute and possess with intent to distribute heroin and of possession of heroin, and they appealed. The Court of Appeals, Kearse, Circuit Judge, held that: (1) submission of reduced count of simple possession to jury after grant of defendants' motions for judgment of acquittal on count charging possession with intent to distribute was within court's authority; (2) action of trial court on such count did not violate principles of double jeopardy; and (3) evidence was sufficient to support finding of conspiracy, notwithstanding defendant's suspicion that co-defendant was police officer and defendant's quarrels with co-defendant.

Judgments affirmed.

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New York City (Edward Gasthalter, John L. Pollok, New York City, on the brief),
for defendant-appellant Errante.

J. JEFFREY WEISENFELD,
New York City (Goldberger, Feldman, Dubin & Weisenfeld, P.C., New York City, on the brief),
for defendant-appellant LoRusso.

Before KEARSE, CARDAMONE and WINTER,
Circuit Judges.

KEARSE, *Circuit Judge:*

Joseph Errante and Vito LoRusso appeal from judgments entered after a jury trial in the United States District Court for the Southern District of New York, Thomas P. Griesa, *Judge,* convicting them of possession of heroin in violation of 21 U.S.C. § 844 (1976), and of conspiring to distribute and possess with intent to distribute heroin, in violation of 21 U.S.C. § 846 (1976). Errante was sentenced to concurrent terms of imprisonment of five years on the conspiracy count and one year on the possession count. LoRusso was sentenced to concurrent terms of imprisonment of two years on the conspiracy count and one year on the possession count.

We affirm the convictions.

I. FACTS

A. *Events Leading to the Prosecution*

The case arises out of an undercover operation by the United States Drug Enforcement Agency ("DEA"), conducted by DEA Special Agent John A. Costanzo, who was regularly stationed in Milan, Italy. Costanzo was assisted by a confidential informant employed by the DEA and identified only as "Mimmo." According to the trial testimony of Costanzo and Mimmo, the operation had its genesis in a dinner attended by Costanzo and Mimmo in September 1980 at the Santa Lucia restaurant in the Little Italy section of Manhattan. At the dinner, Mimmo introduced Costanzo to LoRusso, the proprietor of the Santa Lucia.

In January 1981, after Mimmo and Costanzo had returned to Milan, Mimmo telephoned LoRusso to chat. LoRusso stated that he had been trying to contact Mimmo because a friend of LoRusso wanted to arrange a million-dollar purchase of heroin. After a number of additional telephone calls, LoRusso flew to Rome in the company of Errante on January 24; they were met at the airport by Mimmo and Costanzo. LoRusso introduced Errante and, outside of Errante's hearing, vouched for him despite Costanzo's comment that Errante was wearing "big black shoes" such as policemen wear.

The four men eventually went to a restaurant, where Errante stated that he was interested in procuring heroin as a representative of some people in New York who were trying to start a small family for the distribution of heroin. The ensuing conversation concerned amounts, price, delivery, and the testing of a sample to determine the purity of the heroin. LoRusso participated in the conversation. Later that day, the four met again, and tentatively agreed on the sale of ten kilograms of heroin, for which Errante proposed to pay the New York market price prevailing at the time of delivery. At that time Errante stated that since

everything had been resolved, he would return to New York the following day to consult with his people. Errante asked LoRusso, who was not returning to New York with Errante, to telephone him on January 28 to learn what Errante's people had decided. LoRusso said he would do so and that he would then telephone Mimmo with the information. On January 28, LoRusso telephoned Mimmo and reported that Errante's family were in accord with what had been agreed.

On February 5, 1981, Mimmo and Costanzo arrived in New York to attempt to conclude the sale. Matters did not proceed smoothly. On February 7, Costanzo and Mimmo met with LoRusso and Errante, and Costanzo stated that the price of the ten kilos of heroin would be $120,000 per kilo. Errante stated that he would have to check the price with the people above him, and the four men agreed to meet again the next day. At this point, however, LoRusso commenced to question Errante's bona fides and suggested that Errante might be a policeman. Costanzo stalked away in irritation after pointing out that LoRusso had brought Errante to Rome to introduce him and had vouched for him; and a loud argument erupted between LoRusso and Errante.

Despite their argument, LoRusso and Errante appeared together the next day for the scheduled meeting with Mimmo and Costanzo. At that meeting, it was agreed that the price of the heroin would be $120,000 per kilogram, but Errante stated that his people would not buy all ten kilos at once and preferred to buy one kilo at a time. Costanzo suggested a compromise of five kilos, but no agreement was reached. It was agreed, however, that when an amount was settled on, deliveries would take place in the following way: Errante and an associate would bring the money to the Santa Lucia, where Mimmo and Costanzo would count it and check its genuineness; Errante and Costanzo would then go to where the heroin was stored and Errante would have it tested; Mimmo and Errante's associate would remain at

the restaurant with the money; if the heroin was of satisfactory quality, Errante would speak to his associate at the Santa Lucia and instruct him to allow Mimmo to leave with the money while Errante took possession of the heroin. At this February 8 meeting, LoRusso again speculated that Errante might be a policeman.

That evening, when Mimmo went to the Santa Lucia, he found Errante and LoRusso arguing about LoRusso's suspicions. Errante suggested that they settle the matter by speaking to Errante's people, and he and LoRusso left the restaurant. LoRusso later returned alone and told Mimmo that the man they had gone to see, referred to only as "Mike," had not been available.

On February 9 at the Santa Lucia, Costanzo and Errante agreed to the sale of one kilogram of heroin and arranged for delivery of a sample for testing. Costanzo informed Mimmo and LoRusso of the arrangements. LoRusso repeated his suspicion that Errante was a policeman, but also expressed concern that in the delivery procedures, Errante might attempt to take the heroin and keep the money. LoRusso suggested that he be allowed to remove the money to another restaurant or to take it to the cellar of the Santa Lucia whence he could escape. Costanzo and Mimmo became angry with LoRusso and told him that they did not wish to have anything further to do with him.

That evening, however, when Mimmo returned to the restaurant, LoRusso said that he had managed to contact "Mike" and indicated that his suspicions of Errante had been allayed, saying there would be no further problem. Mimmo then told LoRusso that LoRusso could attend the next day's meeting, at which the sample would be delivered.

On February 10, in the presence of LoRusso and Mimmo in LoRusso's car, Costanzo gave Errante a sample of heroin to be tested by Errante's chemist.

Although the test would have required only a small fraction of one gram, Costanzo gave Errante three grams, which had a retail value of approximately $6,000. Errante told LoRusso to call him later to learn the results of the test. LoRusso thereafter duly telephoned Errante and then informed Mimmo that the delivery could go forward the next day.

On February 11, however, when Costanzo and another DEA agent met Errante and LoRusso at the Santa Lucia, Errante demanded that the heroin be supplied in advance of payment. At this point Costanzo refused to pursue the deal and he and his partner left the restaurant.

Costanzo made two unsuccessful efforts to revive the transaction. First, he had Mimmo telephone LoRusso immediately, and Mimmo and LoRusso met privately that evening. LoRusso complained to Mimmo that Costanzo should not have brought his companion to the meeting earlier that day, since the companion was a stranger to LoRusso. He also suggested that Costanzo should have agreed to deliver the heroin on consignment, and asked whether there was a way the deal could be revived. This conversation was interrupted without any resolution of the matter. Mimmo's second attempt took place on February 26, after he had returned to Milan. Mimmo telephoned LoRusso and stated that Costanzo was now willing to supply the heroin in advance of payment, and asked whether LoRusso could contact Errante. LoRusso replied that Errante did not want to know anything more, that LoRusso had not seen him for two weeks, and that Errante had instructed him to "tear everything," including Errante's phone number.

B. *The Indictment and Proceedings During Trial*

Errante and LoRusso were arrested in September 1981 and were indicted on two counts. Count 1 charged them with conspiring with each other and with other

persons unknown to the grand jury to distribute and possess with intent to distribute heroin, in violation of 21 U.S.C. § 845. Count 2 charged each defendant with possession with intent to distribute heorin, in violation of 21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A) (1976). At trial the government's principal witnesses were Costanzo and Mimmo, who testified to the events described above. Neither defendant testified.

At the close of the government's case, the defendants moved pursuant to Fed.R.Crim.P. 29(a) for judgments of acquittal as to count 2 on the ground that the evidence was insufficient to establish beyond a reasonable doubt that they had intended to distribute the heroin in their possession.[1] The trial court orally granted the motions, stating that the proof of intent to distribute was "entirely speculative and Count 2 is dismissed." (Tr. 733).

The government immediately moved pursuant to Fed.R.Crim.P. 31(c) to have the court submit a charge of simple possession, without intent to distribute, in

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[1] Fed. R. Crim.P. 29(a) provides, in pertinent part, as follows:

> The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

The government advanced two arguments to support its contention that intent had been proven. First, it contended that Errante's transfer of heroin to a chemist would have been a distribution (a proposition with which the court disagreed), and argued that Errante's statements that he would have a chemist test the heroin therefore proved intent to distribute. Second, the government contended that since only a small portion of the three grams of heroin given to Errante was needed for testing, it would "def[y] all common sense" to believe the defendants would not distribute the excess amount. (Tr. 731.) The defendants argued that since the government controlled the size of the sample, it would be unfair for the government to be able to prove, merely from the availability of the excess, that distribution was intended.

violation of 21 U.S.C. § 844, to the jury as a lesser-included offense within count 2. The colloquy, beginning with the court's dismissal of the original count 2, was as follows:

> THE COURT: I think it is entirely speculative and Count 2 is dismissed.
>
> MR. DOUGLAS [Assistant United States Attorney]: We would then move pursuant to 31(c) to have Count 2 considered under the lesser included offense. 31(c) was passed specifically to give the government an opportunity to still go to the jury even if its proof falls short of the greater offense if there is a logical reason to find the defendants guilty of the lesser included offense.
>
> THE COURT: What is the lesser included offense?
>
> MR. DOUGLAS: Simple possession without intent to distribute.

(Tr. 733.) Defendants objected on the ground that submission of the charge of simple possession would be improper under Rule 31(c) in light of the court's action on the original count 2, and that submission of the reduced count would constitute an impermissible variance in the indictment. The court gave both sides until the next day to present arguments.

In the argument on the government's motion, defendants adhered to their initial objections and argued in addition that, since "[a] judgment of acquittal has been entered," (Tr. 771), such a submission would violate their rights under the Double Jeopardy Clause of the Constitution. The trial judge rejected this argument, pointing out that judgments had not in fact been entered, and granted the government's motion, as reflected in the following colloquy:

> THE COURT: ...I think the double jeopardy argument is not a profitable line of inquiry.
>
> MR. SOROKA [Counsel for LoRusso]: I am giving you that reasoning because the record of this case is that a judgment of acquittal was entered.

> THE COURT: No, a judgment of acquittal hasn't been entered. I have granted a motion.
>
> MR. SOROKA: Pursuant to Rule 29 for a judgment of acquittal.
>
> MR. DOUGLAS: The judgment was never entered.
>
> THE COURT: Look, the trial is still going on. The motion was granted. I could reconsider the motion if I wanted to and it wouldn't be double jeopardy. The government could move for reargument.

(Tr. 776-77.)

Accordingly, the court agreed to submit count 2 to the jury as a charge of simple possession. The jury convicted both Errante and LoRusso on count 1 and on count 2 as reduced.

II. DISCUSSION

On appeal, Errante and LoRusso challenge their convictions on a number of grounds.[2] They argue

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[2] LoRusso also challenges his sentence on the ground that no evidentiary hearing was held on his challenges to the contents of his presentence report. We find no error. The procedure to be followed in entertaining challenges to presentence reports lies within the discretion of the sentencing judge, *United States v. Needles*, 472 F.2d 652, 653 (2d Cir. 1973), who should adopt a procedure that will "permit that presentation by the defendant which will enable the sentencing judge to grasp the relevant facts correctly." *United States v. Robin*, 542 F.2d 775, 779 (2d Cir. 1976). Here an adequate amount of time was allowed for LoRusso's review of the report, and his counsel submitted to the sentencing court two letters presenting LoRusso's explanations of certain matters described in the report. The sentencing judge had discretion to determine whether these submissions should be pursued in an evidentiary hearing, and his decision not to hold such a hearing was not an abuse of discretion. There being no indication that LoRusso's sentence was based on incorrect information, the sentence is not reviewable. *E.g., United States v. Tramunti*, 513 F.2d 1087, 1120 (2d Cir.), *cert. denied*, 423 U.S. 832, 96 S.Ct. 55, 46 L.Ed.2d 50 (1975).

principally that the trial court's submission of a reduced count 2 to the jury, after granting their motions to dismiss the original count 2, was unauthorized and subjected them to double jeopardy, and that the evidence was insufficient to convict them of conspiracy as charged in count 1. Finding no merit in any of their contentions, we affirm.

A. *Submission to the Jury of Reduced Count 2*

Defendants renew on appeal their objections to the trial court's decision to submit to the jury a charge of simple possession of heroin, without intent to distribute, as a lesser offense included within the original count 2, *viz.*, possession with intent to distribute. They contend that the modification of count 2 by the court constituted an impermissible variance in the indictment handed down by the grand jury; that the court had no power to submit an uncharged lesser-included offense to the jury without also submitting the greater offense; that since the court had dismissed count 2, it no longer had the power to submit the lesser-included offense; and that even if the power existed, submission of the reduced count after dismissal of the greater offense violated their rights not to be subjected to double jeopardy. We find no merit in any of these contentions.

1. *Power To Submit Reduced Charge: Rule 31(c)*

The decision of the district court to submit the reduced count 2 to the jury was well within the court's authority. Fed.R.Crim.P. 31(c) provides that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged...," *i.e.*,a lesser-included offense.[3] The trial judge may implement

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[3] An uncharged offense is a lesser-included offense if it is composed of fewer than all of the elements of the offense charged, and if all of its elements are elements of the offense charged, *United States v. Giampino*, 680 F.2d 898, 901 (2d Cir. 1932). Because all the elements of a lesser-included offense are by definition comprised within

(Footnote continued on following page.)

Rule 31(c) in a number of ways. He may instruct the jury that it may find the defendant guilty of either the greater or the lesser-included offense. *See United States v. Giampino*, 680 F.2d 898 (2d Cir. 1982). If the jury returns a verdict of guilty on the greater offense, the judge may enter a judgment of guilty on the lesser offense alone. *Virgin Islands v. Josiah*, 641 F.2d 1103, 1108 (3d Cir. 1981); *cf. United States v. Swiderski*, 548 F.2d 445, 452 (2d Cir. 1977). Or, prior to submitting the case to the jury, the trial judge may decide to give effect to the provisions of both Rule 31(c) and Rule 29(a), *see* note 1 *supra*, and submit to the jury only the lesser offense if he has determined that the evidence is insufficient to establish beyond a reasonable doubt that element of the greater offense which is not an element of the lesser offense. *United States v. Blackwell*, 515 F.2d 125, 126-27 (4th Cir. 1975) (per curiam). The last described method was that adopted here.

We are unpersuaded by the defendant's contention that the trial court's power in the present case to submit the lesser-included offense pursuant to Rule 31(c) was extinguished by the court's oral announcement that it was dismissing count 2 on defendants' motions

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(Footnote continued from preceding page.)
the greater offense, the grand jury in charging the greater has also charged the lesser. The submission, therefore, of the lesser offense is within the scope of the indictment. *United States v. Blackwell*, 515 F.2d 125 (4th Cir. 1975) (per curiam).

The primary purpose of the lesser-included-offense rule is "to aid the prosecution when it has failed to prove all of the elements of the offense charged in the indictment." *United States v. Giampino, supra*, 680 F.2d at 900 n.l. There is no question that the crime of simple possession, in violation of § 844, is lesser than and wholly included within the crime of possession with intent to distribute, in violation of §§ 812, 841(a)(1), and 841 (b)(1)(A). Since there was dispute as to establishment of intent to distribute, *i.e.*, the element required for proof of the greater, but not the lesser, offense, a lesser-included-offense charge was required if either party requested it. *See Sansone v. United States*, 380 U.S. 343, 350, 85 S.Ct. 1004, 1009, 13 L.Ed.2d 882 (1965); *United States v. Giampino, supra*.

pursuant to Rule 29 for judgments of acquittal. Although Rule 31(c) would have had no application if there were no pending charge under count 2, that was not the circumstance here. The court's oral granting of defendants' motions for acquittal on count 2 was no more than an interlocutory order, and count 2 remained pending since no judgment had been entered pursuant to Fed.R. Crim.P. 32(b)(1). While the Federal Rules of Criminal Procedure contain no explicit provisions granting the court authority to modify or rescind its orders before a judgment has been entered, Rule 2 states that "[t]hese rules are intended to provide for the just determination of every criminal proceeding," and Rule 57(b) provides that "[i]f no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute." A district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment, whether they be oral, *e.g., United States v. Green*, 414 F.2d 1174, 1175 (D.C. Cir. 1969) (trial judge had authority to withdraw oral decision granting defendant's motion to dismiss indictment), or written, *e.g., United States v. Jerry*, 487 F.2d 600,604-05 (3d Cir. 1973) (district court had authority to rescind written order improvidently permitting defendant to withdraw guilty plea); *cf. United Staes v. Benz*, 282 U.S. 304, 306-07, 51 S.Ct. 113, 114, 75 L.Ed. 354 (1931) (stating general rule that judgments, decrees, and orders in civil or criminal cases may be modified by court within the term in which they were entered), and there is no provision in the rules or any statute that is inconsistent with this power. As the court in *United States v. Jerry* stated,

> [n]othing in the Rules limits the power of the court to correct mistakes made in its handling of a case so long as the court's jurisdiction continues, i.e., until the entry of judgment. In short, the power to grant relief from erroneous interlocutory orders, exercised in justice and good conscience, has long been recognized as within the plenary

> power of courts until entry of final judgment and is not inconsistent with any of the Rules.

487 F.2d at 604. Thus,

> whether the case *sub judice* be civil or criminal[,] so long as the district court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so.

Id. at 605.

We conclude that the action of the trial court here in promptly deciding to submit a reduced count 2 to the jury, thereby modifying its oral decision to dismiss count 2 entirely, was well within the court's authority and was properly designed to ensure the just determination of the charges brought against these defendants.

2. *The Claim of Double Jeopardy*

Notwithstanding the trial court's authority under the rules and its inherent power to modify its interlocutory decisions, a change in decision would be impermissible if it violated a defendant's constitutional right not to be placed twice in jeopardy for the same offense. We find no such constitutional violation here.

The Double Jeopardy Clause provides three fundamental protections:

> "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense."

United States v. Wilson, 420 U.S. 332, 343, 95 S.Ct. 1013, 1021, 43 L.Ed.2d 232 (1975) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The phrase "the same offense" encompasses both the offense charged and any lesser offense necessarily included therein. Thus an acquittal of a greater offense precludes a subsequent prosecution for

a lesser-included offense. *See United States v. Ball*, 163 U.S. 662, 670, 16 S.Ct. 1192, 1195, 41 L.Ed. 300 (1896). The principle underlying the Double Jeopardy Clause

> is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957).

These protections have been viewed in a commonsense fashion, and "where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." *United States v. Wilson, supra*, 420 U.S. at 344, 95 S.Ct. at 1022 (footnote omitted). For example, although the right to the government to appeal an adverse judgment in a criminal case is quite limited, *see, e.g., id.* at 352, 95 S.Ct. at 1026; *United States v. Sanges*, 144 U.S. 310, 12 S.Ct. 609, 36 L.Ed.2d 445 (1892), a statutorily authorized appeal by the government is constitutionally permissible if a reversal will not require that the defendant be tried a second time:

> Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.

United States v. Wilson, supra, 420 U.S. at 345, 95 S.Ct. at 1022. Inversely,

> [a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the

> court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal.

United States v. Scott, 437 U.S. 82, 91, 98 S.Ct. 2187, 2193, 57 L.Ed.2d 65 (1978).

By parity of reasoning, we see no reason why the trial court in the present case was not free before the entry of judgment to amend its own ruling since it did so without subjecting the defendants to a second trial.[4] Normally a judgment of acquittal of a charge, entered prior to verdict on the ground that the evidence was insufficient, would terminate the prosecution on that charge and bar retrial of the defendant on that, or any lesser-included, charge. Where no judgment has been entered, however, and there has been no dismissal of the jury (nor any indication to the jury of a ruling that could prejudice the defendant on such counts as are eventually submitted), there appears to be no constitutional impediment to the court's modification of its oral decision to dismiss the original count.

We do not suggest that entry of a judgment pursuant to Rule 32(b)(1) is a prerequisite to the termination of the prosecution for double jeopardy purposes. A verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense." *United States v. Ball, supra*, 163 U.S. at 671, 15 S.Ct. at 1195. And had the jury been dismissed following the court's oral decision, the absence of a judgment would have been irrelevant to the constitutional issue. Rather, we advert to the absence of a judgment

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[4] We do not suggest that in the present case the government could have appealed the trial court's dismissal of count 2, had the dismissal terminated the prosecution on that count, since a reversal would have mandated a second trial. *United States v. Scott, supra*, 437 U.S. at 91, 98 S.Ct. at 2193.

merely to emphasize the inchoate nature of the oral decision seized on by the defendants. *Cf. United States v. Chinchic*, 655 F.2d 547, 549-50 (4th Cir. 1981) (jury's initial verdict of acquittal, which was not fully announced in open court, was merely preliminary and not binding on the jury; consequently, retrial of defendant after a change in juror vote resulted in deadlocked jury did not constitute double jeopardy). In the circumstances of this case, where the court's oral decision was followed promptly by the modification providing for the reduction instead of the elimination of count 2, and where the reduced count could be, and was, submitted in the normal course of the trial to the original jury, we conclude that the action of the trial court did not violate principles of double jeopardy.

B. *Sufficiency of the Evidence of Conspiracy*

Defendants assert two principal grounds for their contention that the evidence at trial was insufficient to convict them of conspiracy to distribute and possess with intent to distribute heroin. First they argue that LoRusso's suspicion that Errante was a police officer and his quarrels with Errante tended to show that there was never any agreement between Errante and LoRusso. In addition they argue that the evidence failed to show that their interest in heroin ripened into any actual agreement to possess and distribute.[5] Defendants' contentions are without merit.

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[5] Errante also argues that if there was a conspiracy he withdrew from it and that his withdrawal should, as recommended by the Model Penal Code, be a defense to count 1. We reject this argument. We have never viewed withdrawal from a conspiracy as a defense to a conspiracy count directed at the period prior to withdrawal, and we decline to do so here. Moreover, even Model Penal Code § 5.03(6) (Proposed Official Draft, July 30, 1962) would allow a withdrawal defense only if the defendant 'thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." The record here reveals that the transaction fell through on February 11 not because of any renun-

(Footnote continued on following page.)

Viewing the evidence, as we must, in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), we find that evidence an adequate basis for a reasonable juror to conclude that, despite expressions by LoRusso of mistrust of Errante, there was an agreement between LoRusso and Errante. The evidence showed, among other things, that LoRusso initiated with Mimmo the notion that LoRusso's friend wanted to make a million-dollar purchase of heroin; that LoRusso and Errante then traveled together to Rome, where LoRusso introduced Errante to Mimmo and Costanzo and vouched for Errante in the face of Costanzo's reference to Errante's wearing policeman-style shoes; that LoRusso actively participated in the discussions of the terms of the proposed sale of heroin; that LoRusso reported to Mimmo that Errante's people had approved the deal. These events, which the evidence indicates preceded LoRusso's expressions of mistrust, were sufficient to show an agreement between Errante and LoRusso.

Moreover, the jury was hardly compelled to view LoRusso's expressions of mistrust as an indication that LoRusso abandoned his agreement with Errante. There was no hiatus in LoRusso's participation. He continued to accompany Errante to meetings while voicing mistrust. And after telling Mimmo that his suspicions of Errante had been allayed[6]—two days

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(Footnote continued from preceding page.)

ciation by Errante of his criminal purpose, but because he wanted possession of the heroin before paying the purchase price. And LoRusso's statement to Mimmo on February 26 that Errante did not "want to do anything anymore" and had had LoRusso tear up Errante's telephone number, did not suggest that Errante ever renounced the plans of "his people" (*see* note 8 *infra*) to purchase and distribute heroin.

[6] LoRusso points out that as to a number of his statements, such as this one and those in the initial telephone conversation with Mimmo, the only evidence was the testimony of Mimmo, and he

(Footnote continued on following page.).

after they had first been voiced—LoRusso participated in the meeting at which the sample heroin was delivered to Errante; he checked with Errante, in accordance with Errante's instructions, and reported to Mimmo that the test results were satisfactory and that the transaction could therefore be consummated; he attended the final meeting between Errante and Costanzo, which was scheduled to culminate in the delivery of a kilo of heroin; and he asked Mimmo that evening if the deal could not be revived.

(Footnote continued from preceding page.)
claims that the trial judge abused his discretion by declining to charge the jury that the testimony of Mimmo, as an informer, "must be examined and weighed by the jury with greater care than the testimony of other witnesses." We disagree. Although we have frequently encouraged the trial courts to instruct juries to scrutinize an informer's testimony with great care, *see, e.g., United States v. Swiderski*, 539 F.2d 854, 860 (2d Cir. 1976)(reversing on other grounds), the charge is not required "unless substantial prejudice results from its omission." *United States v. Abrams*, 427 F.2d 86, 90-91 (2d Cir.), *cert. denied*, 400 U.S. 832, 91 S.Ct. 64, 27 L.Ed.2d 63 (1970). In *Swiderski*, for example, in which a defense of entrapment was asserted, the paid informer, who operated on a contingent fee basis and who was apprehensive that he himself might be prosecuted, testified that the defendant had initiated the transaction. This testimony was uncorroborated, and special instruction was warranted. 539 F.2d at 860. Prejudice is not likely to occur, however, where the informer has no especial self-interest to protect and his testimony is largely or wholly corroborated. In the present case, Mimmo's testimony was corroborated by that of Agent Costanzo on a number of key points, notably LoRusso's bringing Errante to Rome, where he vouched for Errante, and LoRusso's participation in the receipt of the heroin sample. In addition, many of Mimmo's telephone conversations with LoRusso, as well as the last meeting between the two at which they discussed possible revival of the transaction, were recorded, and the recordings were admitted into evidence. Although these conversations did not make explicit reference to illegal acts, a rational jury could infer from their tenor that LoRusso was an active and willing participant in a conspiracy. Finally, Mimmo himself was not under indictment or threatened with prosecution, and his position with the DEA was "little more than [that of] a salaried employee." (Errante brief on appeal at 3 n.*.) Thus there was little reason to believe that Mimmo was so interested in the outcome of the prosecution that the court was required to give the special instruction.

Thus, notwithstanding the facts that LoRusso raised questions and argued with Errante about whether Errante might be a policeman, the evidence was ample for the jury to find a conspiracy[7] between LoRusso and Errante.[8]

We likewise reject defendants' contention that the evidence was insufficient to support a finding of conspiracy because "no agreement was ever reached by LoRusso and Errante with each other or with Agent Costanzo as to the place and time of delivery of contraband, the amount to be delivered, or the price to be paid ...[T]here was never an agreement as to a definite plan

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[7] LoRusso also asserts that the trial court's instructions to the jury on the subject of conspiracy permitted the jury to convict him if it found that he had merely attended meetings whose illegal purpose he knew but in whose purpose he had not joined. There is one sentence of the charge which could be so construed if read in isolation and if read as stating the only circumstances in which a defendant who has attended meetings is innocent of conspiracy. We note, however, that the court charged that in order to convict a defendant of conspiracy the jury "must find that he participated in some way in the furtherance of the scheme and that he knew specifically that it was for the distribution of heroin and intended that this activity of distributing heroin be carried out." (Tr. 909; emphasis added.) The court's conspiracy charge evoked no objection from LoRusso's counsel, and, viewing the charge as a whole, *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973), we find no error.

[8] Moreover, the indictment charged the defendants with conspiring not just with each other, but also with others whose identities were unknown to the grand jury. Despite the lack of identification, there was ample evidence that Errante conspired with others. For example, Errante repeatedly referred to "his people," who apparently had to be consulted at every turn. And the delivery arrangements called for one of Errante's associates to test the heroin and another to protect the money. The fact that Errante's associates were not identified is no impediment to his conviction of conspiring with them. *See Rogers v. United States*, 340 U.S. 367, 375, 71 S.Ct. 438, 443, 95 L.Ed. 344 (1951). Since Errante's own statements are by definition not hearsay, Fed.R.Evid. 801(d)(2)(A), those statements were proof of Errante's agreements with others. *See United States v. Artuso*, 618 F.2d 192, 197 (2d Cir.), *cert. denied*, 449 U.S. 861, 101 S.Ct. 164, 66 L.Ed.2d 77 (1980).

...[T]he only inference which can be drawn is that at the start of negotiations there was a general understanding in principle to distribute heroin." (Errante brief on appeal at 16-17.) The evidence, when viewed in the light most favorable to the government, was adequate for a reasonable juror to conclude that the agreement between Errante and LoRusso was for the actual commission of illicit acts—*i.e.*, possession and distribution of heroin—rather than just the exploration of general principles. While at the start of negotiations there were many details of the transaction to be thrashed out, the evidence was sufficient to support the conclusion that a concrete agreement was reached. Thus, on February 8, Errante and Costanzo agreed on the price of $120,000 per kilogram; and on that date a method of exchanging the money and the heroin was agreed on, subject to satisfactory testing and agreement on quantity. On February 9, Errante and Costanzo agreed on the quantity of one kilogram. On February 10, sample heroin was delivered, tested, and approved; and LoRusso advised Mimmo that delivery could take place the next day. The fact that on February 11 Errante changed one of the conditions previously agreed to by insisting on delivery of the heroin in advance of payment does not undermine the evidence that agreement had been reached pursuant to which one kilogram of heroin was to be delivered on February 11 for a price of $120,000 with stipulated safeguards to ensure that the buyers received what they were paying for and that the sellers received $120,000 in real money.[9]

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[9] *See United States v. DeRosa*, 670 F.2d 889 (9th Cir. 1982). In *DeRosa*, in which a similar transaction failed because of a last-minute insistence by the defendant sellers of heroin that the purchase money be advanced prior to delivery of the heroin, the court found the evidence sufficient to support a finding that an agreement had previously been reached:

> The heroin deal was not ultimately consummated because there was a "change" in the plans when the New York con-

(Footnote continued on following page.)

From this evidence the jury could have found beyond a reasonable doubt that Errante and LoRusso had agreed to possess and distribute heroin, not merely to consider such acts "in principle."

The judgments of conviction are affirmed.

(Footnote continued from preceding page.)

> nection wanted [the undercover DEA agent] to advance the purchase money before delivery of the heroin. [The agent] objected to this condition and the agreed heroin sale was never completed. Thus, the jury could have reasonably concluded that [the alleged coconspirators] had reached an agreement to sell heroin and were frustrated in their efforts only by a change in the terms of the agreement made by the New York source.

Id. at 895.

Appendix B
Order of Judgment of The Second Circuit Court of Appeals Affirming the Judgment of Conviction and Sentence

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of December one thousand nine hundred and eighty-two.

Filed: December 2, 1982

Nos. 82-1082, 82-1096

Present:

Hon. Amalya L. Kearse
Hon. Richard J. Cardamone
Hon. Ralph K. Winter
Circuit Judges,

UNITED STATES OF AMERICA,
Appellee,

v.

VITO LORUSSO and JOSEPH ERRANTE,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judg-

Appendix B
Order of Judgment of The Second Circuit Court of Appeals Affirming the Judgment of Conviction and Sentence

ments of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

A Daniel Fusaro, Clerk

byEdward J. Guardaro,
Deputy Clerk

Appendix C
Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of January, one thousand nine hundred and eighty-three.

Filed: January 11, 1983

Nos. 82-1082, 82-1096

UNITED STATES OF AMERICA,
Appellee,

v.

VITO LORUSSO and JOSEPH ERRANTE,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Vito LoRusso and Joseph Errante,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court

in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

byFrancis X. Gindhart,
Chief Deputy Clerk